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Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Idriss Jazairy

Summary

The present annual report is the first to be submitted to the Human Rights Council by the first Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Idriss Jazairy.

In the report, the Special Rapporteur describes the activities undertaken since taking office in 1 May 2015 and his views on the foundations and context of the mandate. He provides some clarifying definitions concerning unilateral coercive measures and some elements on guidance from international law, human rights law and humanitarian law. Finally, he presents some preliminary observations, the implementation strategy for the mandate and some projected activities.

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I. Introduction

1. In its resolution 27/21, the Human Rights Council decided to appoint a Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights. The Special Rapporteur was appointed at the 28th session of the Council and took office in May 2015.

2. The present report is submitted to the Human Rights Council by the first Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Idriss Jazairy, pursuant to the aforementioned resolution. In it, the Special Rapporteur lists the activities he undertook from 1 May to 30 July 2015 and provides his preliminary considerations concerning the foundations and context of the mandate. He also presents some preliminary observations, the implementation strategy for the mandate and some projected activities.

II. Activities of the Special Rapporteur

3. The activities of the Special Rapporteur are carried out in accordance with Human Rights Council resolution 27/21.

4. Since his appointment in March 2015, the Special Rapporteur has requested invitations to visit Cuba, Iran (Islamic Republic of) and the United States of America. He has been invited to visit the Sudan. The Special Rapporteur would like to thank the Government of the Sudan for the invitation and has confirmed the visit for November 2015.

5. From 1 May to 30 July 2015, the Special Rapporteur sent a letter to all Member States and relevant stakeholders, including civil society, requesting information to capture the present situation on unilateral coercive measures. He has also reached out to all special procedures and treaty bodies with a similar communication. The Special Rapporteur in addition requested that the human rights mechanisms provide information on the respective work of the mechanism on issues concerning unilateral coercive measures.

6. From 8 to 12 June 2015, the Special rapporteur participated in the 22nd meeting of special procedures mandate holders, held in Geneva.

7. Since his appointment, the Special Rapporteur has also met with representatives of Iran (Islamic Republic of), the Russian Federation, the Sudan, the United States and the European Union. He has also held informal consultations with academia working on Security Council sanctions and on unilateral coercive measures.

8. On 6 July 2015, the Special Rapporteur issued a press release welcoming the re-establishment of formal diplomatic relations between Cuba and the United States and calling for the embargo to be lifted.

9. On 14 July 2015, the Special Rapporteur issued a press release welcoming the nuclear agreement reached between Iran (Islamic Republic of) and the five plus one group of China, France, Germany, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States, and calling for the immediate lifting of sanctions.

III. Reasons for a special procedure on the adverse human rights impact of unilateral coercive measures

10. In its Article 55(c), the Charter of the United Nations calls upon the United Nations to promote "universal respect for, and observance of, human rights and fundamental freedoms". Likewise, the Vienna Declaration asserted the following that "the universal nature of these rights and freedoms is beyond question". Furthermore, in its resolution 60/251, the General Assembly decided that the Human Rights Council should "be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner".

11. Emphasis here is on "universal": the thrust of the provisions of human rights treaties and covenants relate mainly to national jurisdictions of States, although some general comments of treaty bodies, such as general comments No. 8, No. 12 or No. 14 of the Committee on Economic, Social and Cultural Rights do refer to extraterritorial "sanctions". From the point of view of the victims of violations of human rights on the ground, addressing only the adverse human rights impact of domestic measures would leave a protection gap that falls short of the desired universality of human rights. It also stands to reason that the International Bill of Human Rights, which condemns violations of human rights by authorities in the territories under their jurisdiction, would also condemn such violations if perpetrated by the same authorities outside their own borders. The protection gap became painfully obvious during the 1990s, which has been referred to as the "sanctions decade".[1] At that time, the population of States targeted by external "sanctions", such as Iraq, and in particular women and newborn children, suffered most acutely from comprehensive "sanctions", which lead to the unwarranted death of many innocent people. The special procedure, as a Charter-based human rights mechanism, is not constrained by national jurisdictions and can thus address this protection gap. The comparative advantage of a Charter-based body over a treaty body to address this extraterritorial dimension of measures having an impact on human rights, was aptly underlined by the Human Rights Council Advisory Committee in a report dated 10 February 2015.[2]

12. Addressing possible violations of human rights from both national and foreign sources is indeed acting to promote universal respect for the promotion of human rights and fundamental freedoms, as the Human Rights Council was mandated to do by the General Assembly in its resolution 60/251.

IV. Clarifying definitions concerning unilateral coercive measures

13. From Human Rights Council resolution 27/21, one can infer that unilateral coercive measures are measures including, but not limited to, economic and political ones, imposed by States or groups of States to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights with a view to securing some specific change in its policy.

[1] David Cortright and George A. Lopez, *The Sanctions Decade: Assessing United Nations Strategies in the 1990s* (Boulder, Colorado, Lynne Rienner, 2000).

[2] Research-based progress report of the Human Rights Council Advisory Committee containing recommendations on mechanisms to assess the negative impact of unilateral coercive measures on the enjoyment of human rights and to promote accountability (A/HRC/28/74). See in particular para. 60.

14. The Special Rapporteur will consider as unilateral coercive measures, measures other than those taken by the Security Council under article 41 of the Charter of the United Nations. Only the latter are truly multilateral from the point of view of the United Nations, under whose aegis the present report is being elaborated. There is a presumption that, once the Security Council has decided on sanctions, and without prejudice to the exercise of the right to self-defence referred to in article 51 of the Charter, Member States have to comply with its decisions without adding to or retrenching from their content, pursuant to articles 25, 48(2) and 103 of the Charter. However, this is not always the case.

15. Coercive measures imposed by international financial institutions and regional bodies on their own members or on candidates to membership are not usually considered as "unilateral" as they are part of a package of rights and obligations whose prior acceptance by target countries are conditions for membership. Take, for instance, a duty-free zone established between an economic grouping and a partner State. The decision by the former to withhold free-entry status to products originating in land not part of the territory of the partner State according to international law is not a unilateral coercive measure because it is part of an international agreement that carries with it a territorial definition, known to co-signatories.[3] However, the use of international financial institutions by one or several member States through their weighted voting rights as a conduit for their national policies on unilateral coercive measures should be part of the remit of the present mandate.[4] Finally, coercive measures from regional groupings of countries or from one of their Member States targeting third countries are considered as unilateral in the sense that they are imposed pursuant to rules at no time endorsed by the targeted country.

16. Unilateral coercive measures can be comprehensive or targeted. The latter are also referred to as "smart" measures.[5] They owe this epithet to the claim that they minimize collateral damage in terms in particular of avoiding to jeopardize the enjoyment of human rights by the poorest and most vulnerable groups in the society of the targeted country. The former are measures aimed at the whole economy or financial system of a country. They tend to be indiscriminate and therefore to have adverse human rights impacts on the poorest and most vulnerable segments of the society of the targeted country. Their effectiveness is gauged in the light of their capacity to impose broad-based policy changes or to create sufficient economic distress in the targeted country to incite the people to rise against their political leadership. "Smart" coercive measures, for their part, may be aimed at certain sectors of the economic activity of a country or be broader but specific to a circumscribed expanse of territory. Their impact may be to destabilize a particular branch of production or a particular geographic area. The right to work and to a decent standard of living of people deriving their income from the sector or the region may be compromised. However, the adverse impact on human rights in both cases is likely, in theory, to be more limited than in the case of comprehensive coercive measures targeting a whole country.[6] In practice, it may

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[3] Alex Barker and John Reed "European Union close to labelling Palestinian products", *Financial Times*, 20 July 2015.

[4] See, for instance, the Zimbabwe Democracy and Economic Recovery Act (Public Law 107-99-Dec 21, 2001) of the United States of America, which provides that the Secretary of the Treasury shall instruct the United States Executive Director to each international financial institution to oppose and vote against (a) any extension by the respective institution of any loan, credit or guarantee to the Government of Zimbabwe, or (b) any cancellation or reduction of indebtedness owed by the Government of Zimbabwe to the United States or any international financial institution.

[5] Thomas J. Biersteker, "Scholarly Participation in Transnational Policy Networks: The Case of Targeted Sanctions" in Mariano E. Bertucci and Abraham F. Lowenthal (eds.) *Narrowing the Gap: Scholars, Policy-Makers and International Affairs* (Baltimore and London, Johns Hopkins University Press, 2012).

[6] See General Assembly resolution 41/128.

be difficult to distinguish between some "smart" unilateral coercive measures and comprehensive ones, as will be exemplified hereunder.

17. Whether comprehensive or "smart", unilateral coercive measures are hard to reconcile with the Declaration on the Right to Development and in particular with its article 3, which stipulates that "States have the duty to cooperate with each other in ensuring development and eliminating obstacles to development".

18. In summary, any unilateral coercive measure imposed on a country necessarily runs counter to some provisions of the International Bill of Human Rights or peremptory norms and other provisions of customary law. Such measures entail, to different degrees, adverse consequences on the enjoyment of the human rights of innocent people. There is a very wide range of human rights that might be involved, including political, economic, social and cultural rights. The focus of impact assessment should remain on the rights to life, health and medical care, an adequate standard of living, food, education, work, housing and development. The justification provided for unilateral coercive measures is the claim that they aim at the improvement of the human rights situation overall in the targeted country. Thus, it is said that the cost in human rights terms of the coercive measure is justified by the greater human rights benefits expected to accrue from such measures. It remains to be seen whether human rights lend themselves to this kind of calculus.

19. A variety of expressions are being used to refer to unilateral coercive measures. Some refer to them as "sanctions", others as "restrictive measures" and others still use them interchangeably or jointly as, say, "restrictive measures (sanctions)". The term "restrictive measure" does not carry the same ethical overtones of punishment as "sanctions". However, it eschews the mention of "unilateral", which itself raises the issue of legitimacy of such measures since what is unilateral can, in given circumstances, lack legitimacy. The term "unilateral coercive measures", though more cumbersome, has the advantage of not prejudging any of the aforementioned, rather controversial, issues.

20. The Special Rapporteur will use the expression "source countries" when referring to countries initiating and applying unilateral coercive measures and the expression "target countries" to mean countries that have been targeted by unilateral coercive measures, whether the latter themselves are comprehensive or targeted at a particular sector, area or at specific persons.

21. It may be said that the "sanctioning" authority, in order to be legitimate, should have jurisdiction over the "sanctioned" State. It might have to be mandated by the international community to uphold international standards and coerce "deviant" States into conforming to an international agreement or to internationally accepted norms of conduct. It might even, in certain circumstances, be entitled to do so of its own accord. Usually the Security Council has the central authority in this regard. Yet Article 41 of the Charter of the United Nations refers to coercive measures taken by the Council simply as "measures" rather than "sanctions". To suggest that States can impose "sanctions" on other States while the Security Council itself only imposes "measures" that truly deserve to be called "multilateral sanctions", and which will be referred to as such by the present mandate, implies that decisions of States that impose unilateral coercive measures have at least the same legal cogency as those of the Security Council. It also implies that there is a hierarchy among States, between the "sanctioning" and the "sanctioned". This runs counter to the spirit of the Charter and in particular to Article 2(1), which refers to the sovereign equality of all the States Members of the United Nations.

22. Unilateral coercive measures are said to be "extraterritorial" because they are initiated by a country or group of countries and imposed outside their national territory or jurisdiction. The laws imposing them may have extraterritorial effect not only on targeted countries but also on third countries in a manner that will coerce the latter to also apply the

unilateral coercive measures on the targeted country, non-compliance leading to heavy unilateral penalties.

V. Historical retrospect

A. Early uses of unilateral coercive measures

23. There has been a spectacular increase in the resort to unilateral coercive measures since the 1990s. However this form of pressure, which has a particularly negative impact on the enjoyment of human rights when imposed by stronger States or groups of States against weaker ones, is not new. There are records that indicate that already in Ancient Greece in 492 BC, the city-State of Aegina seized Athenian ships and held their passengers hostage as a response to Athens holding Aeginians captive.[7]

24. In the Middle Ages, during the Crusades, religious leaders and church councils in Europe practiced unilateral coercive measures by prohibiting the export of ships, weapons and ammunitions to the Saracens, as Arabs or Muslims were referred to in those days.[8] This became official Holy See policy from the Council of Lateran in 1179 until it was denounced, four centuries later, by Martin Luther.[9] It is interesting to note that, already in those days, the claim to oblige traders from third parties to apply one's own embargo on a target country was invoked. Thus a historian from that period, Peter the Chanter, reports the case of the citizens of Marseilles opposing foreign traders moored in their port and intent on shipping timber and weapons to Alexandria. They called on three bishops to intervene. The latter obliged by excommunicating the traders who, unperturbed, sailed out of the port. The historian reports that they had hardly covered a mile at sea when the ship sank with its crew and cargo.[10]

25. A more recent case in point is the blockade of Germany after the cessation of World War I in order to coerce that country to stand down from its opposition to certain leonine clauses of the Treaty of Versailles. The unilateral coercive measure applied against Germany visited untold sufferings on the German population, whose basic rights were ignored.[11] In fact, the founding fathers of the League of Nations considered coercive measures as the backbone of its policies for the maintenance of peace. That was already a progress on the past, when such measures and in particular blockades were a prelude to war or part of the stratagems of war itself.

26. One could also mention the unilateral coercive measures applied at the initiative of Western countries against the Soviet Union in 1949 — the Coordinating Committee for Multilateral Export Controls — and China in 1951 — the China Committee — and the

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[7] For an account of coercive measures and blockades in Ancient Times, see C. Phillipson, *The International Law and the Custom of Ancient Greece and Rome* (London, MacMillan, 1911), vol. II, pp. 349-384.

[8] See, for example, J. Muldoon, *Popes, Lawyers, and Infidels: The Church and the Non-Christian World 1250-1550* (Philadelphia, University of Pennsylvania Press, 1979), and S.K. Stantchev, *Embargo: The Origins of an Idea and the Implications of a Policy in Europe and the Mediterranean, ca. 1100 – ca. 1500* (Michigan, University of Michigan, 2009).

[9] S.K. Stantchev, *Spiritual Rationality: Papal Embargo as Cultural Practice* (Oxford, Oxford University Press, 2014).

[10] See John Baldwin, *Masters, Princes and Merchants: the Social View of Peter the Chanter and his Circle*, Vol. I, (Princeton, New Jersey, Princeton University Press 1970) p. 267.

[11] C.P. Vincent, *The Politics of Hunger: The Allied Blockade of Germany, 1915-1919* (Athens, Ohio, Ohio University Press, 1985).

entry of the Security Council into the fray of sanctions, imposing them first on Southern Rhodesia in 1966 and then on South Africa a decade later at the initiative of developing countries. The impact of the latter on the enjoyment of human rights of the target population was relatively limited because the measures were circumvented by the source countries themselves.

27. Except for the cases of Southern Rhodesia and South Africa under apartheid, most recent unilateral coercive measures before1975 were implemented in the context of the East-West ideological rivalry. Then came the Final Act of the Conference on Security and Cooperation in Europe, which, in its principle VI, expressed the resolve of the signatories to put an end to autonomous policies of coercive measures. According to that principle, the parties to the Treaty "will likewise in all circumstances refrain from any other act of … economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent to sovereignty". Experience thereafter did not live up to expectations as unilateral coercive measures were redeployed in the direction of developing countries and then escalated again inter alia between the West and the Russian Federation as a result of tension on Crimea and Eastern Ukraine.

28. Most current unilateral coercive measures have been imposed at great cost, in terms of the human rights of the poorest and most vulnerable groups, by developed countries on developing countries. There are a few examples of the reverse situation, such as the Arab oil embargo of 1973 against Western States in response to the position the latter took during the 1973 Arab-Israeli War. There are also cases of developing countries imposing unilateral coercive measures on neighbouring States for short periods of time.

B. Current trends

29. Observed trends do not point to advanced countries giving up the resort to unilateral coercive measures, much to the contrary. This is not to say, however, that the situation has remained static. The Security Council has given up resorting to comprehensive sanctions since 1994, when it last imposed them on Haiti. Following this example, source countries have generally been moving away from comprehensive sanctions to resort rather to "smart" sanctions. These are focused on a particular territory within a target country, on a specific activity, for example, non-proliferation or on a particular category of traded goods, such as the arms trade or the commodity trade. There is also increasing resort to "smart" sanctions that target natural or corporate persons on the basis of their supposed involvement in policy decisions of their State that are challenged by the country or group of countries initiating the unilateral coercive measures. A corpus of legal rules has been devised to redress the excesses of such measures and to submit their use to certain conditions while introducing some measure of due process and independent assessment to gauge the impact of such measures on human rights. This is a positive evolution. It tends to limit the collateral damage of such measures on unintended groups and therefore deserves to be welcomed.

30. The evolution has not been homogeneous in source countries. There is therefore a need to review the progress achieved in different source countries and to consider the possibility of promoting the "best practices" of some such countries or groups thereof to the benefit of others as a step toward the elaboration of "next practices".

31. In reality, however, it is not always easy to translate good intentions in the capitals of advanced countries into measures that safeguard human rights in the day-to-day life of remote communities in the developing world. Thus, the introduction of financial coercive measures such as a ban on the use of international interbank financial telecommunications or a measure undermining the principle of immunity of a central bank's assets can, because of their indiscriminate character, be tantamount to the reintroduction of comprehensive sanctions. Likewise, the superimposition of targeted unilateral coercive measures on

Security Council sanctions may distort the purpose of the latter, putting their initial balance out of kilter. The result may be to transform what was intended to be a "smart" coercive sanction into a comprehensive coercive measure. In the same way, when a number of diverse "smart" unilateral coercive measures converge on the same country, their summation may become a comprehensive coercive measure. Nor does this comprehensiveness, which carries a particularly high cost in terms of adverse human rights impact, necessarily increase the efficiency of the measures. Two cases in point are the coercive measures imposed on Cuba and Iran (Islamic Republic of). It is fortunate that, under the recent initiative of the President of the United States, targeted measures that, when added up become comprehensive coercive measures, are now being called into question. The point is illustrated by the United States Secretary of State, who referred to the transition in relations between the United States and Cuba as taking place because the President "made a personal, fundamental decision to change a policy that didn't work and that had been in place not working for far too long".[12]

32. More generally, gaps still occur between the safeguards surrounding policy on unilateral coercive measures and the real-life adverse human rights impacts of such measures. These gaps need to be investigated, identified and overcome.

33. Progress achieved by source countries in fine-tuning policies on unilateral coercive measures has resulted, inter alia, in the European Union giving up resort to autonomous comprehensive sanctions. However, when targeting a vital sector such as oil and petroleum product exports, such "targeted" measures come to affect, at least indirectly, the whole economy or financial system of a country. There is now also greater recognition that, contrary to past practice, the purpose of unilateral coercive measures should not be to advance the economic interests of source countries. Their proclaimed objective is of late becoming "the upholding of international law, human rights law and humanitarian law".

VI. Negative human rights impacts: how to eliminate or mitigate them and to provide redress for their victims and guidance from international law, human rights law and humanitarian law

A. Elimination of unilateral coercive measures or restrictions to their use

34. The most obvious answer to the first question is to renounce unilateral coercive measures as a tool of foreign policy in recognition of the overarching principle of self-determination proclaimed in articles 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. It is also a recognized principle of customary international law that even economic measures not otherwise prohibited become unlawful if they coerce a State to take action in an area in which it has the right to decide freely. The Vienna Declaration itself, in its part I, paragraph 31, called upon all States "to refrain from any unilateral measure not in accordance with international law and the Charter of the United Nations that create obstacles to trade relations among States and impedes the full realization of the human rights set forth in the Universal Declaration of Human Rights and international human rights instruments in particular the right of everyone to a standard of living adequate for their health and well-being including food and medical care, housing and the necessary social services". Likewise, the Declaration on Principles of International Law Concerning Friendly Relations

[12] See www.state.gov/secretary/remarks/2015/07/244542.htm.

and Cooperation among States in accordance with the Charter of the United Nations[13] as well as article 32 of General Assembly resolution 3281 (XXIX) stipulate that no State may use or encourage the use of economic, political or any other type of measure to coerce another State in order to obtain from it the subordination of the exercise of its sovereign right. This gives legitimacy to the position expressed by developing countries: they reject the imposition of laws and regulations with extraterritorial impact and all other forms of coercive economic measures, including unilateral sanctions, against developing countries and call for their elimination.[14]

35. The Vienna Declaration also calls on States to refrain from any unilateral measure not in accordance with international law or the Charter of the United Nations. Seen from the vantage point of source countries, the portent of the injunction revolves around the determination of which coercive measures effectively run counter to these provisions and which do not. The European Union Guidelines on Implementation and Evaluation of Restrictive Measures stress that "the introduction and implementation of restrictive measures must always be in accordance with international law. They must respect human rights and fundamental freedoms".[15] The guidelines mention that the decisions of the Council if the European Union in the framework of the Common Foreign and Security Policy in this respect are even subject to judicial review by the European Court of Justice.[16] In the *Kadi* case,[17] a decision by the European Council to include a person on a terrorist list was overturned by the European Court of Justice, despite the fact that this was by way of an implementation of a Security Council listing that was unappealable. The adjudication was based on a recognition that, by the standards of peremptory norms and jus cogens, the listing of the claimant violated his human rights and failed to comply with due process. Judging from this audacious precedent, one can draw comfort as to the independent mechanisms to protect targets of unilateral coercive measures from their adverse impact on human rights in the European Union context. Taking a series of recent cases where the General Court of the European Union has annulled "restrictive measures" on human rights grounds, it has been alleged, however, that immediately after annulment, the European Union will often relist the targeted company within days for different reasons.[18] By contrast, in the United States, there exist limited possibilities for an individual or entity subject to an asset freeze decided by the government office in charge of economic sanctions, namely, the Office of Foreign Assets Control, to challenge such decision.[19] Thus far, there have been no reported judicial decisions in the United States reversing a designation established by the Office.

B. International legal framework, including human rights law and international humanitarian law

36. The second question needs to be answered as to what guidance international law, international human rights law and humanitarian law can provide to eliminate or mitigate

[13] General Assembly resolution 2625 (XXV), annex.

[14] See in particular the Declaration of Santa Cruz of the Group of 77 and China, paras. 239-241.

[15] See para. 9 of European Union document 11205/12 of 15 June 2012, available from www.statewatch.org/news/2012/jun/eu-council-un-sanctions-guidelines-11205-12.pdf.

[16] Ibid., paragraph 7.

[17] European Court of Justice, *Yassin A. Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, 2008 Judgement.

[18] "Who are you calling a rogue?", *The Economist*, 20 June 2015.

[19] See, for example, W.B. Hoffman, "How to Approach a new Office of Foreign Assets Control Sanctions Program", *Stetson Law Review*, Vol. 27, Issue 4 (Spring 1998), pp. 1413-1424.

the negative impact of unilateral coercive measures on the enjoyment of human rights and to provide accountability for the source countries and redress for victims.

37. There are, in legal terms and in the context of international law, differences between the concepts of retorsion, retaliation and reprisals, even if the terminology is unsettled and sometimes fluctuant.[20] In summary, retorsion refers to applying pressure on a target country, the latter being or not in breach of its international obligations, without the source country itself suspending any international obligation owed to the target country.[21] Retaliation refers to the *lex talionis*, which demands that a wrongdoer be inflicted with the same injury as that which he has caused to another. It may thus be used to describe a suspension by a source country, by way of a unilateral coercive measure, of its international commitments selectively against the target country to an extent that is proportionate with the wrongful act of the latter, thus staying within the alleged bounds of legitimacy. Finally, the concept of reprisal, traditionally used to cover otherwise unlawful action, including forcible action, taken by way of self-help in response to a breach, is now mostly used to refer to action taken in time of international armed conflict. In that context, reprisals have been defined as "coercive measures which would normally be contrary to international law but which are taken in retaliation by one party to a conflict in order to stop the adversary from violating international law".[22] unilateral coercive measures can be implemented as an alternative, or as a prelude, to the use of force. They may be invoked for political motives or for reasons pertaining to human rights. It is recognized that they are not legitimate if they pursue an economic objective of the source country or group of countries. International law will only consider such measures as legitimate if: (a) they are a response to a breach of the international obligations of the target country; and (b) the breach of such obligations causes injury on a State or group of States giving them the right to retorsion/retaliation. The notion of extraterritorial source of injury giving rise to the right to retorsion/retaliation is clear for political or commercial disputes, but less so for claims of violations of human rights overseas. Be that as it may, the measures taken by the aggrieved State(s) might have been qualified as wrongful had it not been for the fact that they are a proportionate response to a breach of the international obligations by the target country. This legitimacy would also depend on the source countries having given due notice to the target country to have to comply with its international obligations. However, the legitimacy of retorsion/ retaliation may be put in doubt if the negative human rights impact of the unilateral coercive measures undermines basic human rights or if the measures are pursued indefinitely without any progress in achieving their proclaimed objective. Thus, human rights law mitigates the rigors of international law.

38. It may be ultimately that the preferred option to legitimize unilateral coercive measures is to apply to them the legal regime of countermeasures in the sense of the International Law Commission Draft Articles on the Responsibility of States for International Wrongful Acts,[23] article 22 of which reads states that the wrongfulness of an act of a State not in conformity with an international obligation towards another State, as may be the case for unilateral coercive measures, "is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State". However there are

[20] See F. S. Colbert, Retaliation in International Law (New York, King's Crown Press, 1948), pp. 2 and 3, fn. 1.

[21] See "Commentaries on the Draft articles on Responsibility of States for Internationally Wrongful Acts" (2001) *I.L.C.'s Yearbook*, Vol. II, Part Two, p. 128.

[22] See S. Oeter, "Methods and Means of Combat", *Handbook of International Humanitarian Law* (Oxford, Oxford University Press, 2008), p. 232, No. 476. See also S. Darcy, "Retaliation and Reprisals", *Oxford Handbook of the Use of Force in International Law* (Oxford, Oxford University Press, 2015), p. 879.

[23] See *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/56/10).

limitations to the exercise of countermeasures as set out in article 50 of the same text. Countermeasures would thus be wrongful if they affected obligations for the protection of fundamental human rights; obligations of a humanitarian character prohibiting reprisals; or other obligations under peremptory norms of general international law.

39. When applied by international organizational procedure outside that of the Security Council or by regional organizations, the Draft Articles on the Responsibility of International Organizations[24] become relevant.

40. While human rights law is often considered to be "soft law" as compared with international law, general comment No. 31 of the International Covenant on Civil and Political Rights asserts that every State party to the Covenant is "obligated to every other State party to comply with its undertakings under the treaty" by considering that the violation of Covenant rights by any State party requires others to call on violators to "comply with their Covenant obligations". In this case, human rights law is harsher on violators of obligations of human rights treaties than international law in relation to other treaty obligations, as it does not require the State(s) taking unilateral coercive measures to demonstrate injury from breach by the target country of its obligations under the International Bill of Human Rights. By these standards, any State party may intervene — some would say interfere — to call a defaulting State to comply with its obligations, even if the breach of a human rights provision by the latter causes no injury to the former. This raises the question as to whether this general comment opens the way for legitimizing the resort to unilateral coercive measures against States in breach of their human rights obligations. One might doubt it, since the general comment indicates that this call to comply, "far from being regarded as an unfriendly act, [is] regarded as a reflection of legitimate community interest". Unilateral coercive measures are not friendly acts towards target countries. They are punitive and are usually resorted to after a breakdown of diplomatic negotiations. Were this to be a source of legitimacy for unilateral coercive measures, it would mean that any State could at any time take justice into its own hands and react through such measures against perceived breaches of human rights by any other State. It is precisely to avoid this resort of States to self-administered justice, which could easily threaten world peace, that the Charter of the United Nations was adopted and that centralized responsibilities in the field of the use of sanctions were devolved on the Security Council. Article 53 (1) of the Charter stipulates that "no enforcement action shall be taken under regional arrangements or by regional agencies without authorization of the Security Council". The French version of Article 53 refers to "action coercitive", which might cover unilateral coercive measures, though it can be argued that this article refers to resort to military force only. The issue of whether Article 53 precludes recourse to unilateral coercive measures without Security Council authorization is contentious. It is a moot point deserving further investigation by jurists.[25]

[24] See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 39-177. See also in this regard Pierre-Emmanuel Dupont, "Countermeasures and Collective Security: The Case of the European Union Sanctions against Iran", *Journal of Conflict and Security Law*, vol 17 (2012), pp. 301-336.

[25] See A. Abass, *Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter* (Oxford, Hart Publishing 2004), pp. 46-52. See also U. Villani, "The Security Council's Authorization of Enforcement Action by Regional Organizations", *Max Planck Yearbook of United Nation's Law* (2002), pp. 535 and 538-540.

41. International humanitarian law makes it possible in wartime to lift export bans and to provide safe channels to satisfy the basic human rights of the civilian population.[26] The Geneva Convention also bans collective reprisals.[27]

42. Source countries claim that medical equipment, medicines and other items necessary to meet basic human rights are exempt from restrictive measures applied in peacetime. Yet for a series of reasons, 85,000 cancer patients in a country targeted by unilateral coercive measures cannot find locally the required treatment through no fault of the country concerned. Rights holders in target countries where the negative impact of such measures is particularly acute could be considered as in a war zone and benefit from the protection of humanitarian law, which has the advantage of being neutral while the context of unilateral coercive measures is very heavily charged politically. Independent procurement agencies of third countries could be involved in providing humanitarian supplies in peacetime for target countries whose delivery, even though allowed by source countries, may be hampered indirectly because of a payments freeze or ban on the use of international telecommunications payment mechanisms. Likewise, unilateral coercive measures of the kind that prevents access to life-saving drugs are comparable to collective reprisals and would therefore be banned under humanitarian law.

C. Issues of remedies and redress

43. Finally, on the issue of redress for innocent victims of unilateral coercive measures, the European Court of Justice has acted on several occasions to annul decisions regarding such measures taken by the European Union. In very rare cases, it has acted to indemnify symbolically individual victims. Since close to half of the States Members of the United Nations have at one time or another been targeted by unilateral coercive measures in the recent past, the most realistic form of redress would be an apology to innocent victims for the "collateral damage" to their human rights entitlements which has occurred because of those measures, together with a commitment to try harder, if not to end the measures, at least to continue seeking ways to reduce the unintended adverse human rights impact they have on the civilian population.

44. In view of the shortcomings of adjudicatory procedures at the national and regional levels and of the real global challenges posed by unilateral coercive measures at the global level, the issue of an independent mechanism of the United Nations human rights machinery may at some stage have to be considered to promote accountability and reparations.

VII. Projected activities of the Special Rapporteur

A. Information gathering

45. In accordance with his mandate, the Special Rapporteur will endeavour to gather relevant information, including from Governments, non-governmental organizations and other interested or concerned parties, on the negative impact of unilateral coercive measures on the enjoyment of human rights.

[26] See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 70.

[27] See Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Art. 33.

46. The first information needed is data to understand the extent of the problem at hand. For this purpose, letters have been addressed to all stakeholders, inviting them to provide the requisite data. The response by the due date of 30 June 2015 has been fragmentary at best, as has been the case for the participation of "source countries" invited by the Office of the United Nations High Commissioner for Human Rights (OHCHR) to the two workshops on unilateral coercive measures held in 2013[28] and 2014[29] and for the written responses to the Secretary-General from the same States in preparation of the analytical report on this theme, which he submits regularly to the General Assembly.[30] The collection of comprehensive data in this regard is an issue deserving further attention by the mandate-holder.

B. Study and evaluation of the practice of unilateral coercive measures and its adverse impact on human rights

47. On the basis of the fragmentary information gathered, the Special Rapporteur will study the present trends, which all point to an increased resort to unilateral coercive measures despite the concern expressed by the United Nations about this trend. It bears mentioning that concern was already expressed by the Commission on Human Rights in its resolution 1995/45 of 3 March 1995 and regularly reiterated thereafter. The Human Rights Council itself adopted two decisions and seven resolutions[31] expressing inter alia "deep concern" at the fact that coercive measures continue to be promulgated. Furthermore, the trend was has been unaffected by the numerous resolutions and outcome documents adopted by the General Assembly,[32] the United Nations Conference on Trade and Development[33] and other major international conferences[34] strongly urging States to refrain from promulgating and applying unilateral coercive measures. The question arises as to whether the multiplicity of United Nations resolutions adopted on such measures does not signal an emerging customary law and evolving peremptory norms calling into question present trends as they express themselves on the ground.

48. Notwithstanding the 16 targets of sanctions currently applied by the Security Council,[35] there are 37 targets for the European Union[36] and 32[37] for the United States, of which several overlap with Security Council sanctions, the overwhelming majority of the European Union and United States targets being the same countries. Of these targets, 7 concern terrorist entities and traffickers in drugs and blood diamonds, transnational criminal organizations and cybercriminals, which would have been more effective if they had all been concerted at the United Nations level. Many other countries apply unilateral

[28] See Human Rights Council resolution 19/32.
[29] See Human Rights Council resolution 24/14.
[30] See A/69/97 and A/68/211.
[31] Human Rights Council decisions 4/103 and 18/120, and resolutions 6/7, 9/4, 12/22, 15/24, 19/32, 24/14 and 27/21.
[32] General Assembly resolutions 69/180, 68/162, 67/170, 66/156, 65/217, 64/170, 63/179, 62/162, 61/170, 60/155, 59/188, 58/171, 57/222, 56/179, 56/148, 55/110, 54/172, 53/141, 52/120, 51/103, 50/96, 48/168, 46/210, 44/215, 42/173, 41/165, 40/185, 39/210 and 38/197.
[33] See TD/500/Add.1, para. 25.
[34] See, for example, the World Conference on Human Rights, held in Vienna in June 1993.
[35] A list of Security Council sanctions regimes in force, along with reference to the Sanctions Committees set up by the Council to monitor each individual sanctions regime, is available from www.un.org/sc/committees/.
[36] See http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf.
[37] See www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx.

coercive measures and it would be very helpful if they could provide to the mandate the requisite information for future reports.

49. To these sanctions and unilateral coercive measures should be added the coercive measures applied by regional organizations on their own members, as referred to in paragraph 15 above. The League of Arab States, the African Union, the Organization of American States and other regional organizations have thus applied coercive measures on several of their member States. The Organization for Security and Cooperation in Europe also has few such measures applied against the arms trade in relation with Nagorno-Karabakh[38] and a list of Russian individuals targeted.[39]

50. Apart from criminal entities, the targets of sanctions are States, mostly developing countries whose population has often been adversely affected thereby in the enjoyment of their human rights, and selected individuals within those States. These will constitute the focus of the work of the Special Rapporteur in recognition of the fact that the few more developed countries that are the target of unilateral coercive measures have broader options, including through import substitution or through retaliation, to mitigate the adverse impact of such measures on the enjoyment of human rights by their population.[40]

51. The aforementioned totals do not include unilateral coercive measures resorted to by other individual countries whether or not members of the European Union, including those harsh measures undermining the most basic rights of the Palestinian people. Taking those additional individual measures into account, and even excluding criminal entities rightly targeted, it is likely that there are currently over 75 targets of such measures, but the number of countries targeted are of course less than half this number because western source countries tend to have the same target countries in sight. However, in the absence of centralized data, these figures are at best an estimate. Behind these quantitative data, there are millions of people who are prevented from enjoying their basic human rights. One needs to exclude from this count the drug dealers, terrorists or "kleptocrats" who have also been targeted.

52. The Special Rapporteur will undertake a broad-based fact-finding approach towards all stakeholders to establish pragmatically the extent of the adverse impact of unilateral coercive measures, while trying to ascertain the nature of the human rights at jeopardy, whether civil and political or the right to development or cultural or social rights. He will then promote a United Nations-wide rule-based response that can prevent, minimize and redress the adverse impact of unilateral coercive measures on human rights.

C. Drafting of guidelines and formulation of recommendations

53. The elaboration of draft guidelines on ways and means to prevent, minimize and redress the adverse impact of unilateral coercive measures on human rights will be an

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[38] See Organization for Security and Cooperation in Europe (OSCE), Decisions based on the Interim Report on Nagorno-Karabakh, Committee of Senior Officials, Journal No. 2, Annex 1, Seventh Committee on Senior Officials meeting, Prague, 27 and 28 February 1992.

[39] See OSCE, Monaco Declaration and resolutions adopted by the OSCE Parliamentary Assembly at the twenty-first annual session, 2012, resolution on the rule of law in the Russian Federation: case of Sergei Magnitsky, available from www.oscepa.org/meetings/annual-sessions/2012-monaco-annual-session/2012-monaco-final-declaration/1676-07.

[40] For example, the Russian Federation has recently decided to halt the import of agricultural goods, and in particular of pork meat, from the European Union as a result of its sanctions. See http://epthinktank.eu/2014/04/23/russias-import-ban-on-eu-pork-meat/. See also www.europarl.europa.eu/RegData/etudes/BRIE/2014/536291/IPOL_BRI(2014)536291_EN.pdf.

important task for the mandate. There is in this regard a difference in views among Member States as to whether source countries should simply put "an immediate end to unilateral coercive measures", which is the view of target countries and developing countries at large, or whether such measures should remain a key component of foreign policy that at best requires a small adjustment to mitigate their adverse human rights impacts, which is the view of most source countries. This difference in views finds expression in the polarized voting pattern that has prevailed so far in the adoption of resolutions pertaining to unilateral coercive measures. For developing States, adopting guidelines should not signify a recognition of the legitimacy of such measures as a tool of foreign policy, a position they do not countenance. For the source countries, mostly advanced States, of which one group has indeed adopted exhaustive guidelines, the issue might signify no more than sharing such guidelines with others.

54. The Special Rapporteur will seek to promote, through appropriate recommendations, a consensual approach in this regard, giving priority to pragmatic options that can effectively prevent, minimize and redress the adverse impact of unilateral coercive measures on vulnerable groups on the ground.

D. Review and evaluation of mechanisms for assessment and redress

55. The Special Rapporteur will also review existing independent mechanisms set up to assess the adverse impacts of unilateral coercive measures and adjudicatory procedures to permit redress or reparations of aggrieved parties, and will seek to identify best practices and next practices, having in view the necessity to promote the accountability of source countries and the credibility of impact assessment in target countries.

56. In order to mirror in the approach to unilateral coercive measures, progress achieved in respect of United Nations sanctions policy, the Special Rapporteur will review ongoing work in this regard by the High-level Review of United Nations Sanctions and the Inter-agency Working Group on United Nations Sanctions, as well as the lessons to be learned from the Interlaken Process on Financial Sanctions,[41] the Bonn/Berlin Process on the Design and Implementation of Arms Embargoes and Travel and Aviation related Sanctions,[42] the Stockholm Process on Making Targeted Sanctions Effective- Guidelines for the Implementation of United Nations Policy Options[43] and the Greek Process on Enhancing the Implementation of United Nations Sanctions.[44]

[41] Swiss Confederation, United Nations Secretariat and Watson Institute for Strategic Studies at Brown University, "Targeted Financial Sanctions: A Manual for Design and Implementation – Contributions from the Interlaken Process" (Providence, Rhode Island, Thomas J. Watson Institute for International Studies, 2001). Available from www.eda.admin.ch/content/dam/eda/en/documents/home/Handbuch-zu-gezielten-Finanzsanktionen_EN.pdf.

[42] M. Brzoska (ed.), "Design and Implementation of the Arms Embargoes and Travel and Aviation Related Sanctions: Results of the 'Bonn-Berlin Process'" (Bonn, Bonn International Centre for Conversion, 2001). Available from www.watsoninstitute.org/tfs/CD/booklet_sanctions.pdf.

[43] P. Wallensteen, C. Staibano and M. Eriksson (eds.), *Making Targeted Sanctions Effective: Guidelines for the Implementation of United Nations Policy Options* (Uppsala, Uppsala University Department of Peace and Conflict Research, 2003). Available from www.smallarmssurvey.org/fileadmin/docs/I-External-publications/2003/2003%20Uppsala%20Targeted%20sanctions%20effective.pdf.

[44] S/2007/734, annex.

E. Contribution to strengthen the capacity of the Office of the United Nations High Commissioner for Human Rights to provide technical assistance and advisory services to affected countries

57. Pursuant to his mandate, the Special Rapporteur will contribute to backstopping the capacity of OHCHR to provide affected countries with technical assistance and advisory services. Consultations have been initiated with OHCHR to determine the modalities of the special procedure's involvement in this important area.

58. The mandate-holder will investigate the possibility and acceptability of including reporting on unilateral coercive measures and on their human rights impact as part of the universal periodic review process and to organize a cross-cutting mainstreaming session of the Human Rights Council on this theme.

VIII. Conclusion

59. **Only multilateral sanctions approved by the Security Council comply with the letter and spirit of the Charter of the United Nations, which is the bond between all States Members of the United Nations. The political reality, however, has departed from the ideals of the founding fathers based on a vision of the unity of purpose of the victors of the Second World War. Thus, it soon became obvious that the veto powers devolved to the five permanent members of the Security Council would, on occasion, prevent it from adopting sanctions when these were necessary if only to protect innocent populations from abuse of their human rights, or the procedure in the Council for adopting sanctions was too lengthy while the need to resort to coercive measures brooked no delay. It was to be expected that unilateral coercive measures would be adopted to remedy such deficiencies.**

60. **However, the question remains as to whether such measures would still be legitimate if the Security Council had already taken action and adopted appropriate sanctions in good time. This is open to debate, but there are strong legal arguments that support a negative answer. It has been argued that:**

> **From the moment when the Council occupies itself with the adoption of mandatory sanctions, Member States transform into agents for the execution of these sanctions, their duty being to implement them in good faith without undermining their effective application. For States not individually injured, this implies an obligation to suspend measures already adopted at the individual level if they are different or incompatible with the measures decided by the Council, or in any case, to modify them in order to harmonize them with United Nations sanctions. A fortiori, the States in question should not adopt collective countermeasures after the pronouncement of mandatory sanctions but only measures that are necessary and sufficient for the execution of those mandatory sanctions. In short, unless the Council invites States to go further than its own measures — a rare event in practice — the triggering of Chapter VII ends the power of States not individually injured to react as they please at the individual level.**[45]

[45] I. A. Sicilianos, "Countermeasures in Response to Grave Violations of Obligations Owed to the International Community", *The Law of International Responsibility* (Oxford, Oxford University Press, 2010), p. 1142.

61. The debate as to whether autonomous policies of retorsion/retaliation or of countermeasures by States or groups of States warrant unilateral coercive measures in such circumstances and whether or not they comply with international law, customary law and peremptory norms of behaviour, is essentially a political debate between source and target countries. The pragmatic way out of the resulting conundrum has been to focus on the efficiency and effectiveness of such measures and on their human rights impact. The argument goes that if measures achieve their objectives rapidly and if these objectives are viewed as desirable by the international community, they may be considered as legitimate. However, this legitimacy is undermined if the measures have caused, by design or by default, egregious violations of basic human rights.

62. The search for international legitimacy has therefore led to a flurry of initiatives to focus on universally accepted targets, to be monitored closely and adjusted as warranted by evolving circumstances. The aims of the measures targeting countries are to be limited to changing the target country's behaviour if, and only if, it is in breach of an international treaty, covenant or agreement or to signal the international community's disapproval of the targeted country's behaviour. The measures should be time-bound and in view of the modesty of the outcome of unilateral coercive measures in achieving their goals so far,[40] should be combined with a series of other complementary efforts including incentives and negotiations to increase chances of success.

63. But if the human rights impact of unilateral coercive measures on the most vulnerable groups is egregious and if there is no perceptible progress towards the achievement of the proclaimed target, the legitimacy of these measures will be called into question even if a good legal case can be made in support of the action.

64. Resort to unilateral coercive measures in this case is not conditional on demonstration of direct injury by the source-State or group of States. Keeping in mind as a guiding thread the fate of rights holders in target countries who should be protected both by their authorities and by the source countries, it is suggested that the focus of investigations be pragmatic, i.e. to get a full picture of the unilateral coercive measures under implementation, to devise parameters to assess their human rights impact while distinguishing correlation from causation, to identify best institutional practice in source countries and devise United Nations guidelines applicable to such measures to correct and redress their negative impact. This conceptual approach will have to be confronted with case studies to ensure, at all times, a reality check for ongoing research in this regard.

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[40] The rate of success of unilateral coercive measures in the pre-globalization era was 34 per cent and has gone down since then as South-South cooperation mainly with new world economic powerhouses has reduced the constraints of embargoes coming from advanced industrialized countries. See Heather Chingono, Medial Hove and Steven James Danda "Sanctions Effectiveness in a Globalized World" *International Journal of Humanities and Social Studies*, Vol.3, No. 21, December 2013. The success rate of unilateral coercive measures is, however, improved when their impact is compounded not only by incentives but also by supportive international economic trends. Thus unilateral coercive measures of 2012 imposing an embargo on Iranian oil exports added to the drop in oil prices in 2015 enhanced pressure to seal the nuclear deal between the five plus one group and Iran (Islamic Republic of). These developments with respect to Iran (Islamic Republic of) and those relating to the policy to end the comprehensive unilateral coercive measures against Cuba may be the harbingers of a new future trend to seek solutions to international conflicts of interest through negotiation and diplomacy rather than through economic or military violence.